Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG and CAROLYN WHITENER,
d/b/a "The Honk and Holler,"

Appellants,

—v.—

HON. DAVID BOREN, Governor, State of Oklahoma, HON. LARRY DERRYBERRY, Attorney General, State of Oklahoma, HON. D. M. BERRY, Chairman, HON. LAWTON L. LEININGER, Vice-Chairman, HON. J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, HON. RAY WALL, Presiding Judge, Ninth Judicial District Court, State of Oklahoma, HON. CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma, HON. ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma, HON. FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma, and HON. HILARY DRIGGS, Chief of Police, Stillwater, Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, to file the within brief *amicus curiae.* Counsel for the appellants has consented to the filing of this brief; counsel for the appellees has refused consent.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the rights of all persons to equal treatment under the law. Recognizing that line drawing by gender is a pervasive problem at all levels of society, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of law-sanctioned gender-based discrimination.

Lawyers associated with the American Civil Liberties Union Women's Rights Project presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971), participated as counsel for the appellants and later as *amicus curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), represented the appellant in *Kahn* v. *Shevin,* 416 U.S. 351 (1974), the appellees in *Edwards* v. *Healy,* 421 U.S. 772 (1975), and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), and the petitioners in *Struck* v. *Secretary of Defense, cert. granted,* 409 U.S. 947, *judgment vacated,* 409 U.S. 1071 (1972), and *Turner* v. *Department of Employment Security,* —— U.S. ——, 96 S. Ct. 249 (1975), and acted as *amicus curiae* in this Court in several other gender discrimination cases.

The American Civil Liberties Union believes that this case, concerning an age of majority differential based solely on gender, presents an issue significant to the realization of full equality between the sexes under the law. For such differentials cast the weight of the state on the side of traditional notions about the expected behavior of males and females, shore up artificial barriers to the attainment by women and men of their full human potential, and retard society's progress toward equal opportunity, free from gender-based discrimination. Because of the contribution

the American Civil Liberties Union Women's Rights Project has made to the reasoned development of the law in this area, we believe our brief will be of substantial assistance to the Court in the resolution of the issues raised by this case.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The interest of *amicus* appears from the foregoing motion.

Opinion Below

The opinion of the United States District Court for the Western District of Oklahoma, sitting as a three-judge court, is reported at 399 F. Supp. 1304 (1975).

Jurisdiction

On May 17, 1975, the United States District Court for the Western District of Oklahoma, sitting as a three-judge court, filed the judgment which is the subject of this appeal. Appellants' timely motion for a new trial was denied on July 14, 1975. Notice of appeal to the Supreme Court of the United States was filed on August 11, 1975. Following an October 8, 1975 order by Mr. Justice White extending the time for docketing the appeal, the Jurisdictional Statement was filed on October 28, 1975. Appellees' Motion to Affirm was filed on December 10, 1975. Probable jurisdiction was noted on January 12, 1976. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1253.

Statutes Involved

37 Okla. Stat. §§241 and 245 provide:

> §241. *Sale, barter or gift to minor unlawful.*—It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent

> of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.
>
> §245. *"Minor" defined.*—A "minor," for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

Question Presented

Whether 37 Okla. Stat. §§241, 245, prohibiting sale of "non-intoxicating" alcoholic beverages to "minors" and defining as minors males under the age of 21 and females under the age of 18, establishes a gender-based differential impermissible under the fourteenth amendment to the Constitution.

Statement of the Case

This action was commenced on December 20, 1972 to declare unconstitutional and enjoin the enforcement of the gender line established in 37 Okla. Stat. §§241 and 245. Those statutes prohibit the sale of 3.2 percent beer to minors, defined as females under the age of 18 and males under the age of 21. Appellees are state officials charged with enforcement of the statutes in question. Appellants are (1) a male university student over the age of 18 but under the age of 21 and (2) a licensed retail vendor of 3.2 percent beer. The former wishes to purchase, and the latter to sell 3.2 percent beer free from the age limitation applicable to males only.

Since 1933, Oklahoma has separately classified and regulated "intoxicating" and "nonintoxicating" alcoholic beverages. 37 Okla. Stat. §163.1 et seq. Beverages containing more than 3.2 percent alcohol by weight are declared to be "intoxicating." Beverages containing not more than 3.2 percent alcohol by weight are declared "nonintoxicating." Primarily, if not exclusively, the "nonintoxicating" category encompasses 3.2 percent beer. 37 Okla. Stat. §537 (a)(1) prohibits the sale of "intoxicating" alcoholic beverages to any person under 21 years of age. The legislation in question, 37 Okla. Stat. §§241, 245, prohibits the sale of "nonintoxicating" beverages, which encompasses 3.2 percent beer, to males under the age of 21, but permits their sale to females at the age of 18.[1]

Based on this Court's precedent in gender discrimination-equal protection cases from *Reed* v. *Reed,* 404 U.S. 71 (1971), to *Stanton* v. *Stanton,* 421 U.S. 7 (1975), the court below determined that defendant state officials (appellees herein) must demonstrate a fair and substantial relationship between the legislature's resort to gender as the classifying factor and the legislative objective in view. Acknowledging that defendant state officials had not presented, nor had the court otherwise discovered any materials revealing the actual legislative purpose, the court nonetheless concluded: "[W]e feel it apparent that a major purpose . . . was to promote the safety of the young persons affected and the public generally." 399 F. Supp. at 1311 n. 6. The court further concluded, again without any supporting indication in legislative history materials, that

[1] 37 Okla. Stat. §243, prohibiting the employment of minors in a place where "nonintoxicating" beverages are sold for consumption on the premises, is subject to the same gender/age differential. Females may be employed at age 18, males not till age 21.

fair and substantial grounds existed for use of gender as the classifying factor.

The court found "fair and substantial grounds" for the gender line in exhibits tendered by the state officials containing various statistics relating to the drinking proclivities and preferences of males and females, the age and sex of persons arrested[2] for "driving under the influence" and for "drunkenness," and the number of males and females killed or injured in motor vehicle collisions.[3] The court itself twice characterized this proffered data as subject to "several" or "various" criticisms. 399 F. Supp. at 1311 & n. 4. Moreover, the court acknowledged that a study undertaken by the University of Oklahoma Medical Center, and introduced at trial by appellants, established "females were physically no more able, and in some instances were less able, than males to handle comparable alcohol dosages." 399 F. Supp. at 1311. Further, it observed "the case is not free from doubt." 399 F. Supp. at 1314. Despite its expressed doubt and the conceded absence of any evidence as to the basis upon which the legislature in fact acted, the court appraised the quality of the state officials' proof as sufficient to overcome the burden assigned to them. No account was taken of the probability that a similar showing of alcohol use proclivities and preferences could be made along ethnic lines.[4] Nor was any account taken of the reality that proof of the same quality was in fact adduced, or was readily available in census data in supp[illegible] of the

[2] Defendant state officials, on grounds of administrative inconvenience, supplied no evidence as to convictions.

[3] The traffic accident statistics supplied no indication as to alcohol use (or other fault or culpability) by the drivers or the persons killed or injured in motor vehicle collisions.

[4] See note 26, *infra.*

gender lines overturned by this Court in *Reed* v. *Reed, supra; Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975); and *Stanton* v. *Stanton, supra.*[5]

Summary of Argument

I.

37 Okla. Stat. §§241, 243 and 245, establishing a sex/age line to determine qualification for association with 3.2 beer, discriminates impermissibly on the basis of gender in violation of the fourteenth amendment's equal protection clause. This legislation places all 18-20 year old males in one pigeonhole, all 18-20 year old females in another, in conformity with familiar notions about "the way women (or men) are." Upholding the legislation, the court below relied upon overbroad generalizations concerning the drinking behavior, proclivities and preferences of the two sexes. Such overbroad generalization as a rationalization for line-drawing by gender cannot be tolerated under the Constitution.

The Oklahoma legislation in question is a curiosity, apparently the only law of its kind left in the nation. Similarly, the ruling below is an anomaly. It is inconsistent with this Court's decision in *Stanton* v. *Stanton,* 421 U.S.

[5] Statistics and facts this Court found insufficient to justify classification by gender appear in Motion to Affirm at 6 n. 8, and Brief for the Appellees at 9 n. 6, *Frontiero* v. *Richardson, supra;* Brief for the Appellant at 14 n. 9, *Weinberger* v. *Wiesenfeld, supra.* See also Brief for the Commissioner at 14 (10th Cir.), and Petition for Certiorari at 8-9, *Commissioner of Internal Revenue* v. *Moritz, cert. denied,* 412 U.S. 906 (1973), opinion below, 469 F.2d 466 (10th Cir. 1972).

7 (1975), and out of step with an array of authority in lower courts, federal and state, decisions that have made museum pieces of male/female age of majority differentials.

Just as age of majority gender-based differentials have been declared inconsonant with the equal protection principle, so have sharp lines between the sexes relating to the purchase, sale or consumption of alcoholic beverages. The decision below apart, the sole authority for differential treatment of the sexes in relation to alcoholic beverage association is *Goesaert* v. *Cleary,* 335 U.S. 464 (1948). Widely criticized in commentary, in square conflict with decisions of this Court in the current decade and with national equal employment opportunity policy, and politely discarded by the nation's lower courts, *Goesaert* is a decision overdue for formal burial.

On the surface, Oklahoma's 3.2 beer sex/age differential may appear to accord young women a liberty withheld from young men. Upon deeper inspection, the gender line drawn by Oklahoma is revealed as a manifestation of traditional attitudes about the expected behavior of males and females, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions.

II.

Beyond question, Oklahoma has broad authority to regulate effectively the sale and service of alcoholic beverages. But the twenty-first amendment does not insulate from review legislative resort to gross classification by gender. Just as drinking preferences and proclivities associated with a particular ethnic group or social class would be perceived

as an unfair and insubstantial basis for a beverage sale or service prohibition directed to that group or class, so a gender-based classification should be recognized as an inappropriate, invidious means to the legislative end of rational regulation in the public interest.

III.

Even if the highly questionable statistical presentation on which the court below relied served to prove the proposition asserted by appellees (males "drive more, drink more, and commit more alcohol related offenses"), that proposition does not suffice to justify the sex/age classification here at issue. But in fact, the statistical presentation does not do the service claimed for it.

The arrest statistics tendered are unaccompanied by any information as to convictions; no indication is offered of the number of male and female *individuals* arrested; not a single arrest is attributed to 3.2 beer drinking; no attempt is made to deal with the documented "chivalry factor," the reality that for the very same behavior, the young man may be arrested, while the young woman is escorted home. The highway death and injury statistics, the state officials conceded below, are not "specifically on point," for they supply no indication whatever of alcohol involvement in collisions. Finally, the roadside survey introduced below, based on a small and disproportionately male sample, yielded results that may not be generalized to the under-21 Oklahoma population, and provides no information at all as to 3.2 beer drinking.

In sum, the state officials utterly failed to demonstrate that the hypothesized legislative objective (protection of young men and the public from weaknesses male flesh is heir

to) is fairly, substantially and sensibly served by a 3.2 beer sex/age line. The legislation in question is a bizarre and paradoxical remnant of the day when "anything goes" was the rule for line-drawing by gender. 37 Okla. Stat. §§241 and 245, and the decision upholding those provisions, merit this Court's decisive disapprobation.

ARGUMENT

I.

Oklahoma's sex/age classification to determine qualification for association with 3.2 beer pigeonholes impermissibly on the basis of gender in violation of the fourteenth amendment's equal protection principle.

A. *This Court's precedent condemns legislative classification based on overbroad generalization about "the way women (or men) are."*

Since *Reed* v. *Reed,* 404 U.S. 71 (1971), this Court has instructed consistently that gender-based legislative classification, premised on overbroad generalization concerning the behavior, proclivities and preferences of the two sexes, cannot be tolerated under the Constitution. *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975); *Stanton* v. *Stanton,* 421 U.S. 7 (1975). The decision below rests exclusively upon such overbroad generalization. That decision, and the gender line it upholds, merit this Court's decisive disapprobation.

Recognizing that it is no longer in vogue to rely on the "demonstrated facts of life"[6] to justify gender lines in the

[6] *Lamb* v. *Brown,* 456 F.2d 18, at 20 (10th Cir. 1972).

law, appellees offered statistics which, they asserted, tended to show that 18-20 year old males "drive more, drink more, and commit more alcohol related offenses." [7] Even if the highly questionable statistical presentation[8] served to prove the proposition asserted by appellees, that proposition does not suffice to justify the sex/age classification here at issue. Indeed, had proof of the quality presented below satisfied the demands of the equal protection principle, the gender lines this Court has so firmly rejected would have remained on the books.

For example, in *Reed,* the proposition that men have more business experience than women was not without empirical support. In *Frontiero* and in *Wiesenfeld,* the statistics tendered by the Government to document men's nondependency, and their labor-market orientation,[9] were far more impressive than the concededly infirm data[10] relied upon in the case at bar. In short, the essence of this Court's decisions condemning laws drawing "a sharp line between

[7] Transcript of Proceedings before the United States District Court for the Western District of Oklahoma, *Walker* v. *Hall,* May 20, 1974 [hereafter cited as Transcript] at 5 (Appendix at 43) (opening statement of Oklahoma Assistant Attorney General). As the court below repeatedly noted, Oklahoma's statistical presentation indicated that males 21 and over "drive more, drink more and commit more alcohol related offenses" than males in the 18-20 age range. See 399 F. Supp. at 1309, 1311 n. 5.

[8] See pp. 25-34, *infra.*

[9] *E.g.,* to demonstrate men's independence and work force participation, appellees in *Frontiero* presented census data showing that in 1971, "97.7 percent of married men between the ages of 25 and 44, whose wives were present, were in the civilian labor force." Brief for the Appellees at 9 n. 6, *Frontiero* v. *Richardson, supra.*

[10] See 399 F. Supp. at 1311 & n. 4; Transcript at 37-38 (Appendix 66-67) (Assistant Attorney General concedes traffic death and injury statistics (Exhibit 5) do not indicate level of intoxication, if any, and are not "specifically on point"); pp. 29-30, *infra.*

the sexes" [11] escaped appellees and the court below: neither unsubstantiated stereotypes nor generalized factual data suffice to justify pigeonholing by gender; a legislature may not place all males in one pigeonhole, all females in another, based on assumed or documented notions about "the way women or men are."

The sole post-*Reed* cases in which this Court has countenanced classification based on "gender as such" [12] involved legislation justified as compensating women for past and present economic disadvantage. *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974). But Oklahoma's action cannot be rationalized on the ground that nowadays, females may be favored, but not disfavored by the law. For surely the concept "compensatory" or "rectificatory" gender classification[13] does not encompass the solace 3.2 beer might provide to young women already exposed to society's double standards or about to encounter an inhospitable job market.

B. *Sex/age lines in the law cannot be justified on any basis—"compelling state interest, or rational basis, or something in between."*

In *Stanton* v. *Stanton, supra,* this Court held that Utah's sex/age line, drawn for child support purposes, could not survive careful review, whatever the appropriate test, "compelling state interest, or rational basis, or something in between." 421 U.S. at 17. The Court noted that male/female age of majority differentials have become museum

[11] The phrase appears in this Court's discredited decision in *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948); see pp. 19-20, *infra.*

[12] See *Geduldig* v. *Aiello,* 417 U.S. 484, at 496 n. 20 (1974).

[13] Cf. *Frontiero* v. *Richardson, supra,* 411 U.S. at 689 n. 22.

pieces in most states. 421 U.S. at 15. Appellees have not pointed to, nor has our investigation disclosed any state other than Oklahoma that today maintains a sex/age line for "nonintoxicating" 3.2 beer, or even "intoxicating" alcoholic beverage sales.[14] Nor has investigation revealed any state other than Oklahoma that today draws a gender line to determine who may work in a place where alcoholic ("intoxicating" or "nointoxicating") beverages are sold.

The three-judge court hearing in the instant case occurred on May 20, 1974. The decision was filed almost a year later, on May 17, 1975. This Court's decision in *Stanton* was issued on April 15, 1975. It may be that the court below did not sufficiently consider or reflect upon *Stanton* when it voted to uphold Oklahoma's singular 3.2 beer law. While the three-judge court opinion purports not to rely on "old notions" but to rest upon a statistical revelation of sex-linked proclivities, census data provides numerical support of the same quality for the assumptions operative in *Stanton*. If statistics show that young men "drive more" and "drink more," they also show young women marry and relinquish education earlier. Yet surely factual data on the "nesting" proclivity of women[15] would not have persuaded a majority of this Court to uphold Utah's differential.

In sum, the Utah decision in *Stanton* and the decision below ultimately rely on the very same notion—that gross categorization by gender is legitimate legislative action.

[14] Appellees introduced Exhibits (7 and 8) concerning experience in two other states, Minnesota and Michigan. Significantly, legislators in those states did not conceive of a sex/age line as a rational response to a traffic safety problem.

[15] See Transcript at 71 (Appendix at 91).

Indeed, the transcript of the three-judge court hearing[16] strongly suggests that a familiar assumption, not fully articulated in the opinion, influenced the decision—namely, that it is "safe" to allow young women to drink 3.2 beer because young women are (usually) more "mature" than young men, and are (inclined to be) passive, unassertive, "settled," while young men are (generally) boys at heart, (apt to be) adventurous, daring, even reckless. But whether or not the court below wholly discarded "old notions" about the earlier maturation of females, the Oklahoma legislature may have had precisely those notions in mind when it allowed females, but not males, to purchase 3.2 beer and work in 3.2 beer parlors at 18.[17] The hypothesis that the legislature responded to "the common myth" that "women mature faster than men" is at least as plausible as any post-*Stanton* hypothesis defenders of the 3.2 beer sex/age differential might conceive.

The ruling below, in short, is a curiosity. It conflicts with *Stanton* and virtually every other recent adjudication concerning sex/age differentials in the law. See, *e.g.*, *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972); *Matter of Patricia A.*, 31 N.Y.2d 83, 335 N.Y.S.2d 33, 286 N.E. 2d 432 (1972); *Tang* v. *Ping*, 209 N.W. 2d 624 (N. Dak. 1973); *Harrigfeld* v. *District Court*, 95 Idaho 540, 511 P.2d 822 (1973); *Phelps* v. *Bing*, 58 Ill.2d 32, 316 N.E.2d 775 (1974).

[16] See Transcript at 68-78, 95-97 (Appendix at 89-96, 109-111).

[17] See Transcript 68-70 (Appendix at 89-91). Indeed, the first hypothesis tendered by the state officials as to the legislative rationale was "[t]hat there is a difference in the ages of maturity between males and females, with males maturing at an older age." Motion to Dismiss at 7 (Appendix at 19).

C. *Gender-based discrimination in laws regulating the sale and consumption of alcohol is wholly without support in currently viable precedent.*

This case involves more than an impermissible sex/age differential. It also involves the lore relating to women and liquor—a combination that has fascinated lawmen for generations. The legislation at issue is a manifestation, with a bizarre twist, of the erstwhile propensity of legislatures to prescribe the conditions under which women and alcohol may mix. In recent years, however, outside Oklahoma, such legislation has been relegated to history's scrap heap. As the Court of Appeals for the First Circuit said of once traditional judicial essays in this area, "the authority of those precedents . . . has waned with the metamorphosis of the attitudes which fed them. What was then gallantry now appears Victorian condescension or even misogyny, and this cultural evolution is now reflected in the Constitution." *Women's Liberation Union of Rhode Island* v. *Israel,* 512 F.2d 106, 109 (1st Cir. 1975).

The case at bar apart, this decade's precedent unequivocally rejects discrimination between men and women in laws regulating the sale and consumption of alcohol. See *Women's Liberation Union of Rhode Island* v. *Israel, supra; White* v. *Fleming,* 522 F.2d 730 (7th Cir. 1975); *Daugherty* v. *Daley,* 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge court); *Commonwealth* v. *Burke,* 481 S.W.2d 52 (Ky. 1972); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners Ass'n* v. *Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970). In both result and reasoning, the judgment below is an isolated retrogression, packaged in an opinion that jousts with conflicting decisions but ultimately fails to offer a single supporting authority.

Only by wishing away current precedent and reaching back more than a quarter of a century to *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), can Oklahoma conjure up support for a gender-based differential in the context of liquor regulation. Once formidable authority for "a sharp line between the sexes," *Goesaert* is today an embarrassment reflecting male/female role delineation "offensive to the ethos of our society." *United States* v. *Dege,* 364 U.S. 51, at 53 (1960). *Goesaert* appears conspicuously in briefs tendered below by the state officials. But significantly, the three-judge court avoided citation to *Goesaert,* tied as that decision so plainly is to "old notions" and "archaic or overbroad generalizations." See 399 F. Supp. at 1313.

The statute in *Goesaert,* prohibiting employment of women as bartenders, was rationalized as protecting females and the public against "moral and social problems." 335 U.S. at 466. But suspicion lurked that "the real impulse behind [the] legislation was an unchivalrous desire of male bartenders to . . . monopolize the calling." 335 U.S. at 467.[18] In the instant case too, the purported rationale is protection, ironically, protection of males and the public against the vulnerabilities of the dominant sex. But the acknowledged basis for the once pervasive 18 female/21 male age of majority differential[19] suggests another perspective. Is it not probable that Oklahoma's legislators had in view likely coupling at the beer parlor—

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[18] See "Bartending Must Revert to Bartenders, Says the G.E.B.," in Catering Industry Employee (April 12, 1946 pp. 4-5), extracted in Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law 280 (1975).

[19] See L. Kanowitz, Women and the Law 10-13 (1969); Davidson, Ginsburg & Kay, Sex-Based Discrimination 119-123 (1974).

the 21 year old male paired with a female two or three years his junior?

It bears emphasis that no legislative history informed the conjecture of the court below as to the lawmaker's design. Post hoc attempts to hypothesize an appropriate rationale, though once routinely accepted where gender lines were at issue, are no longer immune from close scrutiny. Cf. *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 648 n. 16. Moreover, no legislative design has been advanced that would even remotely satisfy the constitutional requirement that, at the least, gender-based classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." *Reed* v. *Reed, supra,* 404 U.S. at 76. For gender is no more rational or less arbitrary a criterion upon which to base liquor or traffic safety laws than is religion or national origin.[20] If ethnic identification were the criterion, however buttressed by proof of drinking proclivities and preferences, the state officials would "concede error."[21] Their willingness and the three-judge court's readiness to accept the gender line as unobjectionable warrant prompt correction by this Court.

In sum, the instant case provides an opportunity for this Court explicitly to overrule *Goesaert,* a decision universally criticized in commentary,[22] politely discarded by enlight-

[20] See note 26, *infra.*

[21] See Transcript at 79 (Appendix at 97-98).

[22] See, *e.g.*, L. Kanowitz, Women and the Law 33-34 (1969); Johnston, Jr. & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 682-92 (1971).

ened jurists, overdue for formal burial. Cf. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), overruling *Hoyt* v. *Florida,* 368 U.S. 57 (1961). Another opportunity seems unlikely in view of the singularity of Oklahoma's gender line and the illegality of the *Goesaert* classification, as well as the one in 37 Okla. Stat. §243 (18-20 year old females, but not 18-20 year old males may be employed in places where 3.2 beer is sold for on-premises consumption), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and state law analogs. See *Sail'er Inn, Inc.* v. *Kirby, supra; Rosenfeld* v. *Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971).

D. *Laws such as 37 Okla. Stat. §§ 241, 243, 245 shore up artificial barriers to realization by men and women of their full human potential and retard society's progress toward equal opportunity, free from gender-based discrimination.*

Oklahoma's sex/age 3.2 beer line may appear at first glance a sport, a ridiculous distinction.[23] In comparison to other business vying for this Court's attention, 37 Okla. Stat. §§241, 243, 245 might be viewed as supplying comic relief. Yet if this Oklahoma legislative action is not checked, if the overbroad generalizations tendered in its

[23] See Editorial, Tulsa Daily World, January 13, 1975, at 8-A:

> Oklahoma's ridiculous beer law has finally made the big time; it's gone all the way up to the U.S. Supreme Court.
>
> . . . .
>
> For years it has been argued that this is a stupid distinction that, if it ever did have a justification, it was long outdated. It is worse than obsolete; it is laughable . . . .
>
> Let us hope the Justices dispose of it quickly, putting it quietly out of its misery.

support are allowed to stand as proof adequate to justify a gender-based criterion, then this Court will have turned back the clock to the day when "anything goes" was the approach to line drawing by gender. For any defender of a gender line, with a modicum of sophistication, could avoid express reliance on "old notions" and, instead, invoke statistics to "demonstrate the facts of life." [24] But this Court's recent precedent should stand as a bulwark against "the imposition of special disabilities upon the members of a particular sex because of their sex." *Frontiero* v. *Richardson, supra,* 411 U.S. at 686. For "[w]here the relation between characteristic and evil to be prevented" is as "tenuous" as it is here, "courts must look closely at that characteristic lest outdated social stereotypes result in invidious laws or practices." *Sail'er Inn, Inc.* v. *Kirby, supra,* 5 Cal. 3d at 18, 485 P.2d at 540.

On its face, Oklahoma's 3.2 beer differential accords young women a liberty withheld from young men. Upon deeper inspection, however, the discrimination is revealed as simply another manifestation of traditional attitudes and prejudices about the expected behavior and roles of the two sexes in our society, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions, members of the "other" or second sex. S. de Beauvoir, Second Sex (1949); see E. Maccoby & C. Jacklin, Psychology of Sex Differences (1974); W. Chafe, The American Woman (1972); Broverman, Vogel, Broverman, Clarkson & Rosencrantz, Sex-Role Stereotypes: A Current Appraisal, 28 J. Social Issues 59 (1972).

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[24] Cf. *Lamb* v. *Brown,* 456 F.2d 18, at 20 (10th Cir. 1972).

Laws such as 37 Okla. Stat. §§241, 243, 245 serve only to shore up artificial barriers to full realization by men and women of their human potential, and to retard progress toward equal opportunity, free from gender-based discrimination. Ultimately harmful to women by casting the weight of the state on the side of traditional notions concerning woman's behavior and her relation to man, such laws have no place in a nation preparing to celebrate a 200-year commitment to equal justice under law.

II.

The twenty-first amendment does not insulate from close scrutiny Oklahoma's separation of 3.2 beer purchasers along gender lines.

As a "main reason" for its decision, the court below proffered, "the statutes in question concern the regulation of alcoholic beverages—an area where the State's police powers are strengthened by the Twenty-first Amendment." 399 F. Supp. at 1307. Ambivalent, if not schizophrenic on this point, the court also asserted, the twenty-first amendment "does not call for the use of a less stringent equal protection standard than would otherwise apply," "the standards of review [the Equal Protection Clause] mandates are not relaxed." 399 F. Supp. at 1307-1308.

Beyond question, Oklahoma has broad authority to require effectively the sale and service of alcoholic beverages. But the twenty-first amendment is not a talisman insulating from careful review legislative resort to gross classification by gender. This has been the clear understanding of federal and state jurists attentive to this Court's precedent in the current decade. See, *e.g., Women's Liberation Union of*

Rhode Island v. *Israel*, 512 F.2d 106 (1st Cir. 1975); *White* v. *Fleming*, 522 F.2d 730 (7th Cir. 1975); *Daugherty* v. *Daley*, 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge court); cf. *Commonwealth* v. *Burke*, 481 S.W.2d 52 (Ky. 1972); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners Ass'n.* v. *Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1975).[25] Just as drinking preferences and proclivities associated with a particular ethnic group or social class would be perceived as an unfair and insubstantial basis for a beverage sale or service prohibition directed to that group or class (see Transcript at 79, Appendix at 97-98) so a gender-based[26] classification should

[25] As to the precedential value of *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), see pp. 19-21, *supra*. For an account of pre-*Reed* judicial performance, see Johnston, Jr. & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 682-92, 702-708 (1971).

[26] The "facts of life" the state officials sought to demonstrate, cf. *Lamb* v. *Brown*, 456 F.2d 18, at 20 (10th Cir. 1972), might have been demonstrated more dramatically with respect to ethnic and religious groups. Yet surely the long-recognized and well-documented ethnic and religious differences in drinking habits and problems would not justify legislation using ethnic identification or religion as the criterion for a 3.2 beer or any other beverage regulation. See, *e.g.*, Wechsler, Thum, Demone & Kasey, Religious-Ethnic Differences in Alcohol Consumption, 11 J. of Health & Social Behavior 21 (1969); Wechsler, Thum, Demone & Dwinnell, Social Characteristics and BAC Level, 33 Quarterly Journal of Studies on Alcohol 132, 143-44 (1972) (Jews and Italian Catholics consistently manifest the lowest frequencies of positive BAC readings, highest frequencies occur among native-born, Canadian, and Irish Catholics; in the 16-25 age groups, native-born Catholics had the highest proportion with positive BACs (19% in the study reported), Jews and Italian Catholics, the lowest (5%)). Among adolescents, conspicuous differences appear as well. See Williams, Brehm, Cavanaugh, Moore & Eckerman, Final Report of Research Triangle Institute Center for the Study of Adolescent Drinking Behavior, Attitudes and Correlates 7 (National Institute on Alcohol Abuse and Alcoholism, U.S. Department of Health, Education, and Welfare, April 1975) (reporting percentage of adolescent heavy drinkers by ethnic group as follows: Black, 5.7%; White 10.7%; American Indian, 16.5%). See also Kandel, Single & Kessler, The Epidemiology of Drug Use Among New York State High School Students, 66 Am. J. Pub. Health 43, Table 2 (Jan. 1976).

be recognized as an inappropriate, invidious means to the legislative end of rational regulation in the public interest.

Several times in the course of its opinion, the court below found "reinforcement" in this Court's decision in *California* v. *LaRue*, 409 U.S. 109 (1972). *LaRue* upheld state regulations prohibiting nude dancing and explicit sexual acts in establishments licensed to sell liquor by the drink. But whatever support the twenty-first amendment provides for state action explicitly and precisely directed to the commingling of live sex and liquor,[27] that brand of "sex" is not the issue in the case at bar.[28]

III.

The statistical proof on which the court below relied fails to establish that the hypothesized legislative objective (protection of young men and the public, particularly on the road) is fairly, substantially or sensibly served by a 3.2 beer sex/age line.

Evidence "entirely in the form of statistics," embodied in eight exhibits, was the sole proof presented by the state officials. (Transcript at 5, Appendix at 43.) As developed

[27] See Comments, 1975 Wis. L. Rev. 161; 24 Syr. L. Rev. 1131 (1973).

[28] For impressionable minds, the word "sex" may conjure up images of the kind this Court has left to "contemporary community standards." See *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973). Gender, the grammar book term generally used in this brief, has a neutral, clinical tone that may ward off distracting associations.

herein at pp. 13-23, *supra,* even if this proof did the service claimed for it, *i.e.,* even if the proof established that, in general, males within the 18-20 age group "drive more, drink more and commit more alcohol-related offenses" (Transcript at 5, Appendix at 43), such gross generalizations do not provide license for line drawing by gender. In this section, it will be demonstrated that the state officials' presentation does not do the service claimed for it. Further, the presentation falls far short of establishing a fair and substantial relationship between the hypothesized legislative end (traffic safety) and the statutory criterion employed (a sex/age 3.2 beer line).

A. *Oklahoma arrest statistics.*

State officials' Exhibits 1 and 2 (described in 399 F. Supp. at 1309, excerpts reproduced in 399 F. Supp. at 1314-1315) present certain arrest statistics for 1) Oklahoma, covering the last four months of 1973, and 2) Oklahoma City, covering the year 1973.[29] These exhibits show that, for the time periods covered, male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for those offenses.[30] But that is all they show. Unadorned arrest statistics hardly constitute proof that "driving under the influence" and "drunkenness" in the population of 18-20 year olds occur peculiarly in males.

[29] These statistics post-dated the 1972 legislative action here at issue. There is no indication that statistics of any kind informed or influenced the legislative judgment that 18-20 year old males, but not 18-20 year old females, were vulnerable to the hazards of 3.2 beer. See 399 F. Supp. at 1311 n. 6.

[30] Both State and City figures show that male involvement increases with age, *i.e.,* the percentage of female arrests is highest in the 18-20 age range, while the percentage of male arrests is considerably higher at 21 and over than it is at 18. See 399 F. Supp. at 1309.

Among glaring deficiencies in the attempt to associate alcohol-related offenses with young men and 3.2 beer drinking: no evidence whatever was offered as to dispositions or convictions, bare arrests alone are recited;[31] no indication is offered of the number of male and female *individuals* arrested; not a single arrest is attributed to 3.2 beer drinking; no attempt is made to grapple with the "chivalry factor," *i.e.,* the documented reality that for the very same behavior, the male may be arrested, while the female is escorted home, perhaps with a fatherly warning.

As to the inference of offense from arrest, this Court said in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 241 (1957), "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." See also *Gregory* v. *Litton Systems, Inc.,* 316 F. Supp. 401 (C.D. Calif. 1970) (because of general societal practices, use of arrest records in hiring decisions discriminates on race grounds); *Menard* v. *Mitchell,* 328 F. Supp. 718, at 724 (D.D.C. 1971), *rev'd on other grounds,* 498 F.2d 1017 (D.C. Cir. 1974) ("[O]nly a conviction carries legal significance as to a person's involvement in criminal behavior."); McCormick, *Evidence* §43 at 85 (Cleary ed. 1972).

Moreover, even as arrest indications the statistics are opaque: they do not account for multiple arrests. Forty-seven arrests of eighteen year-old males in Oklahoma City

[31] Because it would have been burdensome to do so, Oklahoma law enforcement officers did "not even attempt to keep dispositions as to age groups." Transcript at 26-27 (Appendix at 59). Cf. Transcript at 9 (Appendix at 46-47).

could mean 47 different young men were arrested, or one young man was arrested 47 times, or something in between. In short, the arrest figures do not even negate the possibility that the disproportion is attributable to multiple arrests on the male side, rather than to marked disparity in the number of males and females arrested. Additionally, the arrest statistics demonstrate no relationship between the alleged offense and drinking 3.2 beer, the prohibition which the statistics purport to support. In view of the relative potencies of the beverages, arrestees' alcohol association, if any, might more likely involve 100-proof vodka than "nonintoxicating" 3.2 beer.

Furthermore, Exhibits 1 and 2 tell a familiar story. National arrest statistics for all age groups and most offenses reflect a similar pattern. For example, in 1964, while the sex ratio varied considerably by type of offense, the average arrest ratio of males to females was 7.5 to 1. See Reckless & Kay, *The Female Offender* 4 (1967). See also Nagel & Weitzman, Women as Litigants, 23 Hastings L. J. 171 (1971). Viewed in this light, Oklahoma's arrest figures almost certainly suggest more about the conduct and attitudes of the state's police officers than they do about the 3.2 beer drinking habits of young men and women. For prime among factors identified as relevant to the underinvolvement of women in officially-acted-upon crime is the "chivalry factor," *i.e.*, men's willingness to cover up women's crimes, and the unwillingness of the public and law enforcement officers to hold women accountable for criminal activity. Reckless & Kay, *supra,* at 13.[32]

[32] Paternalism in the criminal justice system and stereotypical views on women's nature do not always operate benignly in women's favor. See, *e.g., New Jersey* v. *Chambers,* 63 N.J. 287, 307 A.2d 78 (1973); Nagel & Weitzman, *supra;* Note, The Sexual Segregation of American Prisons, 82 Yale L. J. 1229 (1973).

B. *Oklahoma traffic death and injury statistics.*

State officials' Exhibits 4 and 5 indicate the number of persons killed and injured in 1972 and 1973 Oklahoma motor vehicle traffic collisions. Youths 17-21 are overrepresented in these statistics; for all age groups, the number of males exceeds the number of females.[33] Although presumably introduced to illustrate the "evil" the legislature sought to prevent, as the state officials themselves acknowledged, these Exhibits are not "specifically on point" (Transcript at 37, Appendix at 67), for they supply no indication whatever of alcohol involvement in collisions.[34] (Transcript at 36, Appendix at 66.) Indeed, closer examination of the state officials' Exhibits should have demonstrated that overrepresentation of young persons in collisions is *not* occasioned by alcohol use:

> If younger drivers were involved in more collisions than older drivers because of the excessive use of alcohol, it would be expected that: (a) young drivers would show a higher frequency of driving-after-drinking than older drivers; and (b) that young drivers would have

[33] However, if state officials' Exhibit 3 is any guide to relative male/female road use, then the 17-21 female death rate is about the same as the male rate, while the 17-21 female injury rate is substantially higher than the male rate. *I.e.,* the 1972 roadside survey population reported in Exhibit 3 was 78% male, 22% female. 399 F. Supp. at 1309. Females accounted for 23% of traffic deaths in the 17-21 age group that year, and 40% of traffic injuries. 399 F. Supp. at 1320 (Exhibit 4).

[34] For all these Exhibits reveal (pedestrian, passenger and driver death and injuries are lumped together in the portions of the Exhibits excerpted by the court below, 399 F. Supp. at 1320-1321), all collision victims may have been free from fault, and all persons responsible for the deaths and injuries may have been 18-20 female 3.2 beer drinkers.

a worse collision-involvement index among all drivers, whether they had been drinking or not, than among alcohol-free drivers. *A comparison of Tables 7 and 8 shows that this is not true.* (Emphasis supplied.)

Proceedings of the Joint Conference on Alcohol Abuse and Alcoholism, February 21-23, 1972, Defendants' (state officials') Exhibit 8 at 120, 124 (Appendix at 213-214). In short, Oklahoma's age- but not alcohol-correlated collision statistics suggest a relationship between accidents and driving experience. They might well support a compulsory driver-training law, but they provide no basis for a 3.2 beer sex/age classification.

C. *National, Minnesota and Michigan statistics and reports.*

Exhibit 6 (Appendix at 182-184) is an FBI report showing an increase nationwide in arrests for "driving under the influence." It reveals no convictions, shows nothing about 3.2 beer drinking and does not present any sex/age breakdown for 18-20 year olds. Exhibit 7 (Appendix at 185-207), a Minnesota Department of Public Safety report, was introduced to show "Oklahoma statistics are at least in line with statistics in other states." (Transcript at 41, Appendix at 70.) Minnesota maintains no sex/age line for 3.2 beer or, indeed, any other beverage. Exhibit 8 (Appendix at 208-226), a federally-sponsored conference report, was introduced for its reference to a Michigan study. A portion of the Michigan study is quoted in the opinion below. 399 F. Supp. at 1310. Michigan maintains no sex/age line for 3.2 beer or, indeed, any other beverage. As already noted,[35] the Michigan report, in a passage skipped over by

[35] See p. 29, *supra*.

the court below, explains that younger drivers are *not* involved in more collisions than older drivers because of the excessive use of alcohol.

D. *A roadside survey in Oklahoma City.*

The remaining item in appellees' proof, state officials' Exhibit 3, figures in the opinion below as the *pièce de résistance*. This Exhibit summarizes the results of a voluntary roadside survey of drivers in selected locations in Oklahoma City during the post-work hours 6:00 p.m. to 10:00 p.m. and 11:00 p.m. to 3:00 a.m. in August of 1972 and 1973. Drivers were asked: 1) Do you drink? 2) If you do, what is your drink preference (beer,[36] wine, liquor)? 3) Did you drink in the last two hours? Survey participants were tested for Blood Alcohol Concentrations (BACs). No inquiry was made as to 3.2 beer drinking. The survey provides no answers at all to the questions: 1) Did the drivers who stated a preference for beer prefer "nonintoxicating" 3.2 beer over other alcohol beverages? 2) Did any driver consume 3.2 beer within the two hours preceding the survey? 3) Had any driver who registered a positive BAC imbibed 3.2 beer? Whatever limited purpose the survey may have been designed to serve,[37] Exhibit 3 is highly questionable as an indicator of the gender make-up of Oklahoma's driv-

[36] The court below incorrectly reports that in 1972, 84% of the under-20 males surveyed, and 77% of the under-20 females stated that their drirk preference was beer. 399 F. Supp. at 1309. Taking into account nondrinkers in the survey population, 58.8% of the under-20 males and 52.9% of the under-20 females preferred beer.

[37] No testimony was offered as to the purpose of the survey. No basis was laid for any inference that the small male sample (243 males under-20 in 1972, 238 in 1973) and minimal female sample (70 females under-20 in 1972, 68 in 1973) displayed characteristics that may be generalized to the under-20 Oklahoma driv-

ing population, and as a predictor of gender-based differences in conduct related to drinking and driving. The exhibit provides no elucidation of any kind as to conduct related to drinking 3.2 beer and driving.

Males accounted for 52.9% of Oklahoma's driving population in 1972, and 52.5% in 1973. U.S. Department of Transportation, Federal Highway Administration, Drivers Licenses—1972 and 1973.[38] The sample of drivers interviewed for the Oklahoma City survey was 77.8% male in 1972 and 76.8% male in 1973. Similar disproportions appear in the sample of drivers in the 18-20 age range. Although it is reasonable to anticipate more drinking in nighttime hours, it may well be that a daytime hours survey would produce a higher percentage of female drivers and a significantly different distribution in the positive BAC columns.[39] Considering the small size of the survey popu-

ing population. In addition to the small size of the under-20 survey population, a numerical discrepancy, unexplained in the Exhibit or Transcript, casts further doubt on the survey's utility: the survey reports 243 as the total number of under-20 males interviewed in 1972, but the BAC columns for that group account in numbers and percentages for 253 males. Further, one-third of the "minor" male population covered by Okla. Stat. §§241, 243, 245 (20-year olds) ranks as adults in the survey.

[38] Drivers Licenses—1972, Table DL-1A, p. 6 (18-20 drivers at Table DL-21, Sheet 4); Drivers Licenses—1973, Table DL-1A, p. 8 (18-20 drivers at Table DL-21, p. 14). The most recently published national licensed drivers statistics, covering the year 1974, show these figures for Oklahoma: total licensed drivers, 1,711,805 (52.21% male); 18 year old drivers, 45,565 (53.29% male); 19 year old drivers, 46,155 (53.03% male); 20 year old drivers, 45,191 (52.81% male). U.S. Department of Transportation, Drivers Licenses—1974, Table DL-21, Sheet 4.

[39] Since the survey occurred after work hours and in a city, the sample does not reflect daytime suburban housewife drinking/driving behavior for 18-20 year olds or any other age group. Further, the sample included drivers of "pickup trucks and an occasional motorcycle," drivers more likely to be male. See Exhibit 3, cover letter.

lation, any unprovided for difference in male/female drinking/driving habits, such as time of day, yielding even a very few more women on the road with positive BACs, would drastically alter the female percentages and, in turn, the comparison with the male group. For example, the court below observed: "Of those drivers under 20 [in the 1972 survey] who had a BAC of greater than .01%, 29.7% of the males and 14.3% of the females had a BAC equal to, or greater than, .05%." 399 F. Supp. at 1309. Restating these figures in terms of the total under-20 survey group, 4.35% of the males and 1.43% of the females had a BAC equal to, or greater than .05%. Should a change from nighttime to daytime survey add two more females to the .05% BAC category, the female percentage (4.29%) would nearly match the male's.

In addition, far from supporting distinctive treatment of young men, the survey suggests that age may be more relevant to the drinking behavior of female drivers. For example, in 1972, the percentages of under-20 males and females who answered yes to the question, "Do you drink," are in the same range: 70.4% for males, 68.6% for females. But when young people are compared with their elders (persons 20 and over), young women stand out as the group distinctive in attraction to alcohol: 76.8% of the older men, but only 57.7% of the older women reported themselves as drinkers.

In sum, the state officials have utterly failed to demonstrate that the supposed legislative objective (protection of young men and the public from weaknesses male flesh is heir to) is fairly, substantially and sensibly served by a 3.2 beer sex/age line. On the contrary, the gender criterion retained in 37 Okla. Stat. §§241, 243, 245 is a paradoxical

remnant of the day when sharp lines between the sexes were routinely drawn by the legislature, and just as routinely upheld by the judiciary.

CONCLUSION

For the reasons stated above, the decision of the District Court for the Western District of Oklahoma should be reversed and the gender line drawn in 37 Okla. Stat. §§241, 243 and 245 should be declared unconstitutional.

Respectfully submitted,

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